Vol. 79

Vol. 79

NO. 66-20

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

CLOVIS BEEDING, Plaintiff-Appellant, vs. ALLEN C. BURNS, d/b/a ELEVENTH STREET MOBILE HOME SALES, Defendant-Appellee.	Appeal from the Circuit Court for the 17th Judicial Circuit, Winnebago County, Illinois.

MR. JUSTICE SEIDENFELD DELIVERED THE OPINION OF THE COURT:

Clovis Beeding brought suit against Allen C. Burns, d/b/a Eleventh Street Mobile Home Sales alleging failure to pay commissions under the terms of an employment agreement. A motion, as amended, for Summary Judgment, supported by affidavits, pleadings, deposition and exhibits, was granted by the trial court on the grounds that an accord and satisfaction had been established between the parties as a matter of law. Beeding appeals from this judgment.

On this record these essential facts appear:

In the Spring of 1963, the plaintiff became employed as a salesman in the defendant's business of selling mobile homes at retail, with his compensation to be comprised of commissions calculated at the rate of twenty-five per cent of gross profits on sales made by him. Against these commissions, the plaintiff made frequent draws of one hundred dollars each and, on occasion, of two hundred or three hundred dollars.

According to the discovery deposition of the plaintiff, the parties had a conversation in early July, 1963, concerning

the plaintiff's commissions, and both parties acknowledged that the commissions due the plaintiff at that time were "several hundred dollars." A few weeks later, the plaintiff told Roland Burns, the brother of defendant, who worked in the business with defendant, that the commissions then due were "several hundred dollars and probably several thousand." Except for saying "this thing should be brought to a current basis," Roland Burns made no comment on the plaintiff's estimate of the commissions due.

In the Fall of 1963, the plaintiff attempted to pursue the matter through discussion with the defendant's bookkeeper, but the latter stated that he had no instructions from the defendant to calculate the plaintiff's commissions and therefore could not do so.

Thereafter, in late Fall, 1963, the parties again had a discussion concerning commissions, and according to the plaintiff's deposition, the defendant said "he didn't know the exact amount of commissions I had coming, but why didn't I just call it even at the time it started out with me working by the week. At that time, I told him I would like to see the exact figures, and I wasn't interested in just calling it even at that time." In the course of that conversation, the defendant apparently neither acknowledged nor denied that commissions were due the plaintiff.

Shortly before Christmas, 1963, the parties agreed that thereafter the plaintiff would be compensated at a straight salary of one hundred dollars per week. At that time the plaintiff again asked for the commissions due him, but there is no evidence as to what the defendant said in respect of the commissions at that time.

On December 27, 1963, the defendant's bookkeeper prepared a check made out to the plaintiff in the amount of one hundred dollars, bearing the notation in the upper left-hand

corner of the face of the check: "COMMISSIONS PAID IN FULL TO DATE." This check was cashed by the plaintiff.

The commissions were not discussed again by the parties until the summer of 1964, at which time the defendant told the plaintiff "that he did not owe any additional money."

Plaintiff's employment with the defendant terminated in mid-October, 1964, with the defendant's agent preparing and signing a check made out to the plaintiff under date of October 19, 1964, in the amount of one hundred dollars. This check bore the following notation in the upper left-hand corner: "FINAL COM." The plaintiff drew a line through "COM." and inserted below it the word "Salary," and cashed the check.

Additional facts alleged in affidavits filed by the defendant are that the two checks involved were issued pursuant to the defendant's direction, and that "during the year of 1963, there existed a dispute" between these parties concerning monies owed the plaintiff. This latter allegation of a "dispute" was denied by the plaintiff's affidavit.

The briefs of both parties agree with and adopt the well settled rule that where there is a bona fide dispute between a debtor and creditor as to the amount due, an accepted payment of the amount claimed due by the debtor will discharge the debt where it is offered in full satisfaction. In re Estate of Cunningham, 311 Ill. 311, 315 (1924). The question is whether such an accord and satisfaction exists, as a matter of law, on the record before us.

The plaintiff argues that there is a serious question of fact as to whether the "dispute" between the parties is of a sufficient nature to support an accord and satisfaction, and that it was, therefore, an error for the court below to have granted the defendant's motion for summary judgment. In essence,

the plaintiff's position is that the present record does not disclose a dispute at the time of either of the payments in question, and further, that the present record is not conclusive as to the bona fides of the defendant insofar as the dispute is concerned.

Regarding the timeliness of the dispute, the plaintiff's position is well taken. That the dispute must have existed at the time of payment, and not at any other time, was specifically held in In re Estate of Cunningham, 227 Ill. App. 124, 130 (1922) (modified on other grounds, 311 Ill. 311 (1924), the Court saying:

> ". . . the time of the application of the rule of accord and satisfaction is the time of payment or settlement and not at any time prior thereto."

The first payment in question was made on December 27, 1963. Neither at that time nor at any time prior thereto had the defendant as much as indicated that he disagreed with the plaintiff as to the commissions due. On the contrary, he agreed with the plaintiff in July of 1963 that at that time there were "several hundred dollars" due the plaintiff for unpaid commissions. Based on the present record, the defendant took no position whatsoever during the parties' last conversation on the subject before the issuance of the check. And some months earlier, he simply stated that he did not know the amount due and suggested that the parties "call it even." While there might have been reluctance to pay the plaintiff, the record does not disclose a dispute as to the amount or existence of the debt at the time of the first payment.

Similarly, the second payment in question was not accompanied with an indication that the defendant disagreed with the plaintiff. True, the defendant said in the summer of 1964 that he did not owe any money to the plaintiff, but this was considerable time prior to the one hundred dollar payment of

October 19, 1964. Furthermore, as far as the record reveals, that payment may not have been a payment at all toward the "disputed" commissions. It may just as well have been the plaintiff's salary check for his final week of employment, since he was at that time employed for a straight one hundred dollars per week. Furthermore, the defendant's statement during the preceding summer that he owed the plaintiff no commissions may have been based upon his erroneous belief that a full satisfaction had taken place at the time of the earlier payment, and not because he believed all of the earned commissions had been paid.

In addition to the apparent question of fact as to the timeliness of the alleged dispute, we have other and more fundamental reasons for holding the trial court to have erred in granting the summary judgment.

The only evidence whatsoever in the record to support a dispute is the statement that, in the summer of 1964, the defendant *said* he did not owe the plaintiff any commissions. This is not sufficient to show, as a matter of law, that the "dispute" was legitimate, or that the defendant's statement was made as a good faith reflection of his actual belief. The question of *bona fides* could only be determined after a review of *all* of the evidence by the trier of fact.

A case in point is *Teague v. John E. Burns Lumber Co.*, 187 Ill. App. 225 (1914), where the defendant, upon receiving the plaintiff's invoice for materials delivered, sent the plaintiff a check in a lesser amount together with a "contra" account for damages caused by an alleged delay in the shipments. Although the check was accompanied with a letter advising the plaintiff not to cash it unless it was accepted in full settlement, the plaintiff nevertheless cashed the check and brought suit for the balance due under the invoice. The jury returned

a verdict for the plaintiff, and the defendant appealed on the grounds that the court should have directed a verdict for the defendant and that in any event the verdict was against the manifest weight of the evidence. In affirming the trial court, it was said (at 228):

> "Although we do not find in the decisions in our own State any directly in point, we think, in reason, that the existence of bona fides in the dispute on the part of the debtor in such cases is a question of fact, and as such belongs to the jury to decide. It cannot be that a debtor shows such good faith merely by asserting it. Every dishonest and reluctant debtor might thus harass his creditors by saying: 'Take part or nothing except at the end of a law suit.'" (Emphasis added)

See also First National Bank of Chicago v. Aladdin Industries, Inc., 283 Ill. App. 572, 579 (1936).

Even on the abbreviated record before us, there is sufficient evidence to raise a question as to the defendant's good faith. For example, the complaint alleges that the plaintiff's commissions were to equal twenty-five per cent of the gross profits on sales made by him, and the formula for ascertaining gross profits is set forth in the complaint. For all we are able to determine, it may have been a simple matter for the parties to ascertain the precise commissions due by a review of the defendant's records. Indeed, plaintiff testified in his deposition that he asked both the defendant and the defendant's bookkeeper to check these records, but neither complied as far as we are aware. If there were a refusal by the defendant to find out what could easily have been found out, he would hardly be in good faith in saying he did not know the precise amount of commissions due. He should not be permitted to hide behind his ignorance when it results from the intentional shutting of his eyes.

Such a situation is not unlike the one presented in

Good v. Krause, 215 Ill. App. 333 (1919), where the defendant had agreed to settle and compromise a claim which had no reasonable basis whatsoever in law, for a payment by the defendant of two thousand dollars. When the plaintiffs brought suit on the settlement, the court stated (at 339):

> "In the present case plaintiffs had no reasonable claim to personal property left by the deceased, and we hold the assertion and compromise of such a claim furnished no consideration for a promise however honest and mistaken the parties may all have been."

In order for the defendant to prevail on his defense of accord and satisfaction, he must show a good faith dispute between the parties, at the time of his payment, as to the amount actually due the plaintiff. We deem it unnecessary to recite the many authorities holding that Summary Judgment pursuant to Chapter 110, Section 57, Smith Hurd Annotated Statutes 1965 is improper when a genuine issue remains as to material facts. We hold there there are sufficiently material questions of fact concerning the timeliness and bona fides of the "dispute", assuming such a dispute ever existed, that the granting of the defendant's motion for summary judgment was error.

The judgment below is reversed and the cause is remanded for trial on the merits.

REVERSED AND REMANDED.

MORAN, J. and ABRAHAMSON, J. concur.

79 I.A.2 160

No. 66-23

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1967

Abstract

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs. RONALD L. TEE, Appellant.	)	Appeal from the Circuit Court of Henderson County, Illinois.

CORYN, J.

This is an appeal by defendant, Ronald L. Tee, from a judgment of conviction for reckless driving entered upon a verdict in the Circuit Court of Henderson County. The issues raised are: (1) that the trial court erred in denying defendant's motion for change of venue; (2) that defendant was not proved guilty beyond a reasonable doubt; (3) that the court erred in refusing to admit certain evidence offered by defendant; and (4) that the court erred in refusing certain of defendant's instructions and giving certain of the People's instructions.

On January 19, 1965, an information was filed in the Circuit Court charging defendant with reckless driving on January 17, 1965. On February 10, 1965, defendant appeared for arraignment with counsel, entered a written plea of "not guilty," and demanded trial by jury. On the same date the Burlington Hawkeye, a daily newspaper published in Burlington, Iowa, with a substantial circulation in the western portion of

Henderson County, printed an article stating that Ronald Tee had "pleaded guilty in the Circuit Court. . . [in Oquawka] . . . Wednesday to a charge of reckless driving." Defendant demanded a retraction of this article, and on February 14, 1965, the Burlington Hawkeye, in its Sunday issue, printed a retraction, stating that it was in error in previously reporting that defendant had entered a plea of guilty. On October 11, 1965, defendant, pursuant to Ill. Rev. Stat., ch. 38, § 114-6 and ch. 146, § 22, filed a motion for change of venue based upon the erroneous newspaper report of February 10, 1965. Attached to this motion for change of venue were several affidavits made by residents of Henderson County, in all of which it is stated that due to the error in the newspaper article, defendant is unable to obtain a fair trial in Henderson County, the "general opinion of the population in said county at present . . . being. . . that said defendant is guilty of the charge of reckless driving."

Defendant admits that the determination of the foregoing motion rests in the sound discretion of the trial court, but argues that the newspaper article so clearly prejudiced the residents of Henderson County against him that it was clear that defendant would be unable to obtain a fair trial in said county, and that the trial court accordingly abused its discretion in refusing to grant his motion. In support of this argument, he cites Sheppard v. Maxwell, _____ U. S. _____, 86 Sup. Ct. _____, 16 L. ed 2d 600.

In the instant case, defendant was charged with a misdemeanor, and the facts as set forth in the affidavits show that only one newspaper on one occasion, in a fifteen line news article appearing on the financial and grain market page, erroneously reported that he had entered a plea of guilty to this charge. Four days after the erroneous news article appeared,

the same newspaper, in its Sunday edition, in an eleven line news article, retracted the previous error and correctly reported that defendant had entered a plea of "not guilty." The Burlington Hawkeye did not again, prior to trial, report on this case, and apparently there were no reports of this case in other newspapers, or on radio or television. Defendant's jury trial commenced on November 29, 1965, more than ten months after his arrest for reckless driving, and more than nine months after the initial article in the Burlington Hawkeye.

In People v. Allen, 413 Ill. 69, the Supreme Court stated that a decision on a motion for change of venue to a different place is not to be predicated merely "upon the number of affidavits on each side" of the question. "Nor," said the court, "does the mere filing of such affidavits alleging prejudice warrant ipso facto a change of venue. . . . It. . . [is] . . . for the trial judge to evaluate the integrity of the affiants and the sincerity of the affidavits in the light of the nature of the. . . [charge] . . . and the circumstances prevailing in the county, and then ascertain whether there was reasonable ground for believing defendant would not get a fair trial."

Defendant, in the case at bar, did not preserve the voir dire examination, and no showing is made that he had difficulty in selecting a jury, or that he utilized all his peremptory challenges. Whatever might have transpired at the hearing on his motion, held pursuant to Ill. Rev. Stat., ch. 38, § 114-6, is not shown in the record. In this circumstance, there is nothing before us from which we could conclude that the trial court abused its discretion, unless it can be said that the motion and affidavits alone make this apparent. In our judgment, they do not. Moreover, the facts, insofar as they are revealed by the affidavits, do not

parallel those in the Sheppard case, upon which defendant relies.

The arrest of defendant arose out of an automobile collision on the morning of January 17, 1965, on Highway No. 164 at the south edge of the Village of Oquawka. One of the vehicles involved was being driven by defendant, and the other vehicle was driven by George Thye. Where Highway No. 164 enters at the south edge of Oquawka, there is a sharp curve to the east. As a vehicle approaches this curve from the south, there is a deep depression; then the highway rises and turns sharply to the right. Vehicles traveling north or south on this highway would be required to travel almost completely through the curve before traffic approaching from the opposite direction could be observed. Highway 164 immediately north of the curve is level and straight, and runs through a residential area of Oquawka. The curve is designated a no-passing zone, and is also posted as a speed zone with a limit of thirty-five miles per hour. There was no snow on the highway on the morning of the accident, but there was some snow piled in the ditches along the highway.

George Thye testified that he was fifty-eight years of age at the time of the accident, that he had lived in Oquawka for seventeen years, and was familiar with Highway 164. At approximately 6:45 a. m. on the morning of January 17, 1965, he and his wife had left their home in Oquawka, and from a side street had turned south onto Highway 164, at a point approximately 400 feet north of the dangerous curve. He stated that he proceeded in the southbound lane of the highway at about twenty to twenty-five miles per hour, and saw no vehicles between himself and the curve. After he had traveled approximately 150 feet towards the curve, he saw two cars coming around the curve going north, approximately side by side, the car in the westbound lane coming sideways, with its rear wheels off the west

side of the highway. He said he saw these cars only for a second, as they were going sixty miles per hour or more. The car coming at him sideways straightened out its course of approach and crashed into his vehicle almost head on. At the time of the impact, Thye had stopped his car in his own lane, or the western half of the highway. Thye testified that the approaching car in the eastbound lane was a short distance behind the car approaching him in the westbound lane. Gertie Thye testified that she was riding with her husband, and that as she looked up from her purse, she saw two cars coming toward her. She had no time to recognize anything; the next event she remembers is being in the hospital.

State Policeman, Samuel W. Nolen, a resident of Oquawka, discovered the accident shortly after leaving his home. He stated that Thye's 1965 Chevrolet was facing north on the eastern side of the highway in the northbound lane, and that defendant's 1957 Ford was in the ditch off the west side of the highway facing south. Two persons were in the front seat of the Chevrolet, and one person in the front seat of the Ford. He stated he measured the rear of defendant's automobile to be 260 feet north of the beginning of the curve. At about 9 o'clock on the morning of the accident, Officer Nolen visited the defendant in the hospital. He testified from his report that defendant, at that time, had stated to him, "I ran off the road. We hit. I hit somebody, and all I know is that I ran off the road and then we hit. I hit something."

Marion McKenzie, 27 years of age and a resident of Oquawka, testified that before the accident he had talked with defendant at the Gladstone junction, which is approximately six miles south of Oquawka. He thereafter followed defendant on Highway 164 as they drove northerly towards Oquawka. He stated that he had made no attempt to pass defendant, and that the lights

on both vehicles were lit. As defendant entered the sharp curve at the south edge of Oquawka, he was, according to McKenzie, in the right hand lane of traffic traveling about sixty to sixty-five miles per hour, and approximately seventy-five yards ahead of McKenzie, who said that his own speed was about sixty-five to seventy miles per hour. Although the sun was not up, McKenzie saw Thye's 1965 station wagon proceeding toward him from the north in the middle or center of the road. He did not observe any lights on the Thye automobile. He saw the defendant's car collide with the Thye vehicle, whereupon he slammed on his brakes, then lost control of his vehicle, and then had to struggle to regain control so as not to collide with the other vehicles. McKenzie stated that as defendant's car went around the curve, part of it was over the center line into the western half of the highway, and that defendant's automobile was a little over the center line when the collision occurred, as was Thye's automobile. He did not know how fast defendant was going at the time of the impact, but stated that he himself had been doing seventy miles per hour before he put on his brakes.

Defendant stated that he was twenty-six years of age and has lived in Oquawka for about fifteen years, and was familiar with Highway 164. On the morning of the accident he was returning from Burlington where he had worked at the J. I. Case plant on the second shift. After work, at approximately 3 a. m., he had stopped for a drink. He was coming back from Burlington when he met McKenzie at the Gladstone junction, where they talked for about two or three minutes, then he headed north to Oquawka, with McKenzie following. He stated that he drove approximately sixty or sixty-five miles per hour on this stretch of highway, and that when he came to the hill at the curve south of Oquawka, he slowed down.

According to defendant, it was clear and cold that morning, the road was clear, and the sun was not yet up. Defendant let up on his accelerator as he came to the speed zone at the curve, and was going about sixty miles per hour when he passed that sign. He did not see any oncoming traffic until he rounded the curve, and then saw a car, without lights, in the middle of the highway. His car was in good working order. He applied his brakes, skidded to the right, and after braking, was traveling fifty-five to sixty miles per hour. He denied that the rear of his vehicle skidded in any way, but said that he tried to avoid hitting the Thye car by swerving his steering wheel to the right and by hitting the foot brake. He did not remember giving any statement to Officer Nolen at the hospital.

Allan Tee, the brother of defendant, arrived at the scene of the accident before the vehicles and the parties involved had been removed. He testified that he had been in the fender and body repair business, and that it appeared to him that the Thye white Chevrolet was hit almost head on and possibly a little more to the right than left of center, and possibly at a slight angle. He said that defendant's car had been hit more on the right half of the front, and that the right front wheel had been pushed back. Several photographs, admitted to evidence, indicated that the two vehicles collided almost head on.

Defendant argues that this evidence falls short of establishing his guilt beyond a reasonable doubt, and more specifically, that the evidence totally fails to show his intent, or "wilful and wanton disregard for the safety of persons." (Ch. 95 1/2, § 145 Ill. Rev. Stat.) We do not agree. Reckless driving is not a crime of specific intent; rather, the necessary criminal intent is implied from the manner in which the accused operated his automobile. If defendant operated his motor vehicle in such a manner

as to demonstrate a wilful and wanton disregard for the safety or property of others, criminal intent is implied. People v. Boryszewski, 317 Ill. App. 656, 47 N. E. 2d 343. In our opinion, the jury, under the conflicting evidence in this case, could properly conclude that defendant was guilty of reckless driving. City of Greenville v. Willman, 44 Ill. App. 2d 156, 194 N. E. 2d 552.

Defendant's claim that the court erred in refusing to admit certain evidence offered by him arose out of the refusal by the trial court to permit him to answer certain questions propounded to him by his attorney, as to whether he was on good terms with Thye, his reaction when he observed Thye's car on the highway after coming around the curve, whether he knew it was Thye's car, and what was his state of mind. We do not deem it necessary to comment at length on this claim of error. These questions were clearly objectionable, as they dealt with matters not relevant to the issues being tried, or called for the conclusions of the witness.

Defendant next argues that the court erred in giving People's Instructions 2, 3 and 4, and in refusing Defendant's Instructions 3, 4 and 7. We find no error in the instructions. People's Instructions 2 and 4 correctly inform the jury that it is not necessary to prove ill-will and specific intent in a reckless driving case, but that intent is implied if the jury finds from the evidence that the accused consciously, and in a gross manner, failed to exercise reasonable care for the safety of others. People's Instruction 3 properly framed the issues raised by the amended information. Defendant's Instructions 3 and 4 were "sudden emergency" instructions, and were properly refused by the court as not being relevant to the issues in a criminal prosecution for reckless driving. This same type of instruction

is now not recommended in civil suits. See IPI § 12.02 and 12.03. Also, Defendant's Instruction 7 was properly refused as it directed the jury to consider the conduct of George Thye in determining whether the defendant was guilty of reckless driving. Contributory negligence or criminal conduct of another driver is not an issue in a case of this nature, but rather, the jury is properly confined in its deliberations to the limited issue of whether the accused is guilty, under the evidence, of reckless driving.

Accordingly, the judgment of conviction is affirmed.

Affirmed.

Stouder, P. J. and Alloy, J. concur.

NO. 66-88

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

RUTH R. PLAIN, Plaintiff-Appellee, vs. JOHN G. PLAIN, Defendant-Appellant.	Appeal from the Circuit Court for the Sixteenth Judicial Circuit, Kane County.

MR. JUSTICE SEIDENFELD DELIVERED THE OPINION OF THE COURT:

The husband appeals from an order awarding the wife temporary support and temporary attorney fees under a complaint for Separate Maintenance, and from an oral motion to dismiss the complaint made at the commencement of such hearing. The wife's motion to dismiss the appeal on the ground that the order is not final and appealable as to that portion of the case involving the motion to dismiss the action, has been taken with the case.

The oral motion to dismiss referred to the denial in the answer to the complaint that the parties were living separate and apart at the time of the filing of the complaint. Husband's counsel further stated that he believed that the court "lacked jurisdiction," and moved "at this time on the pleadings that the cause of action be dismissed." Although the wife's counsel questioned the propriety of the motion in that the complaint stated that the parties were living separate and apart through no fault of the wife, and the court stated, "I think possibly it is improper," the court did permit questioning as to that

issue. It appears from the record that the trial court was led into hearing this evidence, although this was not involved in the notice of the hearing, by the suggestion of husband's counsel that this followed the precedent in Baumgartner v. Baumgartner, 16 Ill. App.2d 286. However, there the complaint failed to make the necessary allegations nor was it supported by any proof in a full hearing on the issues made by the complaint and answer. An injunction there prevented a husband who left for work during the day, as usual, from returning home. This is not the case here. On reflection, the trial court in the order appealed from dismissed the motion. We believe this was proper under the circumstances.

In the instant case, it would appear that the court was hearing such evidence only as it related to the right to receive temporary support, and pursuant to a notice for that purpose. The complaint stated a cause of action and the court had jurisdiction, contrary to the claim of the husband's counsel. The motion to dismiss the complaint in this case, even considering the provisions of Section 50 (2) of the Practice Act (Chap. 110, Sec. 50 (2), Ill. Rev. Stat., 1965), is not a final and appealable order, whether the motion be considered on the complaint alone or with reference to the complaint and answer. Rotheimer v. Rotheimer, 34 Ill. App.2d 1, 7-8 (1962):

Section 50 (2), aforesaid, was not intended to enlarge the scope of review of parts of cases, nor to apply to cases not involving multiple claims. This complaint for Separate Maintenance does not involve multiple claims as contemplated under that section, nor does it make appealable that which was not otherwise appealable. Rotheimer v. Rotheimer (supra); Veach v. Great Atlantic & Pacific Tea Co., 22 Ill. App.2d 179 (1959). This court has recently held

that the test of finality of an order lies in the substance and not in the form of the order. Thus the addition of words "that there is no just reason for delaying the enforcement or appeal of this order" does not by itself import finality. Peach v. Peach, 73 Ill. App.2d 72 (1966).

The record discloses that this hearing was a limited one and did not purport to be a trial on the merits of the Separate Maintenance action. It was a hearing on the motion for temporary support and attorney fees. Therefore, this portion of the appeal is dismissed.

The husband in this appeal questions the propriety of the court's awarding the wife the sum of $35.00 per week as temporary support, $150.00 as temporary attorney fees and $50.00 suit money. He claims that the wife is not entitled to any award as the pleadings and evidence reveal that the complaint was not filed in good faith; and that the evidence did not justify the awards in any event.

The question of the bona fides of the suit is aimed at whether the husband and wife were living separate and apart on April 22, 1966 when the wife filed for Separate Maintenance. The undisputed evidence was that the husband had not eaten any meals at the home in the previous one and one-half years; had ceased paying her any money for household expenses or any other purpose since September, 1964; his last conversation with her was in March of 1965 when he told her that he was going to knock her through the rear window; that they had little communication for many years and had occupied separate bedrooms in the house. The wife testified that the husband was gone on four consecutive weekends beginning with March 16, 1966, then he was home five weekends and then gone six weekends, which she described as sometimes Friday through Tuesday; that he would not take his

clothes on these occasions but only toiletries; that on the day before the filing of the action he came in while she was at work and stripped the walls of all of the oil paintings and removed them from the home, together with all of the stereo equipment; he had previously taken a suitcase full of clothes; that he came home the following Monday night after the filing of the suit and has been at home since then; and that sometime previously the home had been the subject of a partition suit which the husband successfully prosecuted.

The husband offered an explanation for his removing the paintings and stereo equipment and declared that his intention at all times was to return. However, for the purpose of determining the wife's good faith in the hearing for temporary support, there was sufficient evidence to support the trial court on this issue. This court has recently stated that while a temporary award will not be made unless the complaint was filed in good faith, this does not mean the court may inquire into the merits of the action, or the likelihood of the wife prevailing, but must merely satisfy itself of the good faith. Roback v. Roback, 59 Ill. App.2d 222, 225 (1965).

The husband next contends that the award may not stand because there was insufficient evidence of the wife's needs, the husband's ability to pay, the value of the legal services rendered and the need of suit money.

The evidence showed that the husband's net worth was in excess of $200,000., that he had income of $15,000. to $18,000. the previous year, owned four horses, and in general maintained a high standard of living. The wife had earnings from employment the previous year of $3,600; $800. in a savings and loan account; and $60. in stock dividends. They had been married 31 years. Under these facts an award of $35.00 per week to the wife as

temporary support was well within the court's discretion. Rabin v. Rabin, 57 Ill. App.2d 193, 197 (1965).

Under the facts and with it appearing that the complaint had been filed, a motion and notice for temporary support prepared, and with a substantial court hearing, the court acted well within its discretion in awarding $150. in attorney fees and $50. in suit money. The husband's argument that there was no showing of the value of the services or the amount required for suit money is without merit in the absence of his request that evidence be heard. In the absence of such request, the record of the financial circumstances, the obvious need of the wife, and the legal services already performed were sufficient. Canady v. Canady, 30 Ill. 2d 440, 446, 447 (1964).

The order of the trial court as to support, attorney fees and costs is affirmed.

AFFIRMED

Moran, J. and Abrahamson, J., concur.

66 - 93

NOT TO BE PRINTED
IN FULL

In The

APPELLATE COURT OF ILLINOIS

Abstract

Second Judicial District

JOHN COMER, Plaintiff-appellee, VS. SANTO J. CORPORA, Defendant-appellant,	Appeal from the Circuit Court of Winnebago County, Illinois. Honorable Arthur V. Essington, Judge Presiding

Mr. Justice Atten delivered the opinion of the court:

This is an appeal by the appellant, Santo J. Corpora, from a judgment entered against him in the Circuit Court of the 17th Judicial Circuit, Winnebago County, Illinois on the 28th day of April, 1966, in favor of John Comer, appellee, in the sum of $5,000.00. Appellant alleges several errors in his brief. We find from reviewing the evidence, however, that the controlling question on this appeal is whether the verdict was aginst the manifest weight of the evidence.

The cause was heard on appellee's complaint and appellant's counterclaim wherein each substantially charged that the other, willfully, wantonly and recklessly with malice and intent to do bodily harm, did beat and strike the other about the head, arms, body and legs with a deadly weapon. Both parties denied these charges. In addition appellant filed an affirmative defense wherein he alleged that the appellee initiated the assult and battery complained of, without provocation on the part of the appellant; and that the acts of the appellant were in necessary self-defense to himself, his place of business and of the other customers therein.

A fair sumation of the evidence for appellee is that

at about 6:30 A. M. on the morning of September 18, 1965, appellee, John Comer, entered the Ace Liquor Store and Tavern located at 505 W. State Street, Rockford, Illinois, which was owned by Santo J. Corpora and Sam Corpora. He stayed in the tavern until around 11:30 A. M. During the time he was in the tavern he spent his time drinking and playing pool with some of the other patrons. He admitted that he had some 32 or 33 drinks of a mixture of vodka and squirt, but was not intoxicated. Around 11:00 A. M. appellant was working at his adding machine on the liquor counter, which was some 10 feet from the bar where appellee was sitting, and between 12 and 15 people were then in the tavern. Appellee had just finished playing a game of pool with a partner, Eugene L. Ives, which game he won. He didn't remember the name of the person who they were playing against for $1.00 a game. He had asked him to pay, but payment was not made. He then stated that appellant had asked him to leave the tavern and he said, "I will leave when I finish my drink." Appellant answered from behind the bar, "You are leaving right now." The appellant then came out from behind the bar with a crowbar in his hand, and again told appellee to leave and again appellee stated that he would leave when he finished his drink. Appellant said, "You are leaving now." The appellant then hit appellee on the side of the head and shoulder with the bar; that appellee had nothing in his hand, but he reached down, picked up a bar stool to defend himself against the crow-bar when appellant swung again striking appellee and breaking some bones in appellee's elbow at which time appellee threw the stool which flew down past the liquor counter, hitting appellant; that appellant again hit appellee on the back, shoulder, side and leg; that appellee picked up a pool cue and traded blows with appellant, hitting him 2 or 3 times, when the cue was knocked out of his hand, appellant then struck appellee several more blows.

A fair sumation of the evidence for appellant is that appellant, Santo J. Corpora, got to the tavern about 11:00 A. M. He got his books in readiness to make out some time schedules and the payroll for employees. There were about a dozen customers in the place at that time;

that he knew the appellee, had known him for some 7 or 8 years; that appellee was there drinking and had become loud, boasting and obscene; that he and a customer by the name of Jim Buehre were having words; that Jim came up to appellant and said, "This fellow is really bugging me." At which time appellee came over to appellant and said, "Well you are next." Appellant said, "What do you mean?" He said, "I would like to take you little so and so dago on." Appellant said, "I think you have had enough to drink and I think you ought to leave." Appellee said, "You make me leave." Appellant then said, "I think you had better go right now." At that appellee who was then next to the bar picked up a bar stool and threw it hitting appellant in the chest, arm and leg with the stool prongs at which time appellant hit appellee for first time, then appellee went to a pool table, grabed a cue and immediately came at appellant with the cue. Appellant kept backing away trying to keep out of range, trying to keep him away from hitting people at bar. Appellant got in back of counter where appellee hit him several times on back, shoulder and arms with the heavy end of the cue; at this point appellant struck appellee again.

It is apparent from all of this testimony that there is a serious dispute between the parties as to how the incident occured and who was the actual aggressor. The primary factual issue which had to be resolved by the jury was who was the actual aggressor and who struck whom first. The jurors, as the tryer of the facts, heard the testimony and observed the demeanor of the respective witnesses, and by their verdict accepted appellee's version of the incident.

It is a well established rule that where the evidence is conflicting in order for a verdict to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. Likewise a verdict should not be set aside merely because the Jury could have drawn different inferences from the evidence. On this question, the Jury found fit to accept one of the two conflicting versions on both the Complaint and the Counterclaim. We cannot see that a conclusion opposite to that reached by the jury was clearly apparent. In such situations this Court will not substitute its judgment

for that of the Jury. Meyre Construction Co. v. Drobnick, 49 Ill. App. 2d 51, 56.

The jury saw and heard the witnessess and were in a better position than this court, from reading the cold record, to determine the credibility of each witness and the weight to be given to their testimony and such other evidence as was offered at the trial. Colby v. Turner, 9 Ill. App. 2d 416. The verdict of the jury will therefore not be set aside and the judgment of the trial court will be affirmed.

Judgment affirmed.

Davis, P. J. and Seidenfeld, J. concur.

Filed 12-29-66

79 I.A.2 265

No. 66-32

In The

Appellate Court of Illinois

Second District

SALLY H. FAIRWEATHER, Plaintiff-Appellant,	)	Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois
vs.	)	
ROBERT BREEN, Defendant-Appellee,	)	Honorable Glenn K. Seidenfeld, Chief Judge

Mr. Justice Atten delivered the opinion of the Court:

Plaintiff, SALLY FAIRWEATHER, commenced an action to replevy a five-year-old gelding named "Reno's Pride", which had been purchased by her in September, 1960, and boarded by defendant, ROBERT BREEN from that time until February, 1962. The terms of the agreement under which defendant was to board and train the horse are in dispute. After the filing of the Replevin action by the plaintiff, defendant denied the allegations in the Complaint and filed a Counter-claim for board, show fees and other expenses incurred by him during said period of time, totaling the sum of $2287.52. Plaintiff in turn denied the allegations of defendant's Counter-

claim. The cause was heard by a jury, who returned a verdict of $2000.00 on which a judgment was rendered at the conclusion of the arguments for a judgment not withstanding the verdict and /or a new trial.

Defendant's Counter-claim is in two counts; (1) for a statutory lien and a sale thereunder, and (2) a judgment based upon the reasonable costs and expenses incurred by him in the transaction. Plaintiff in turn contends the parties have a written contract and any reference to a quantum meruit recovery was improper.

Plaintiff's testimony as to the material substance of the agreement was that defendant was to house and feed the horse for one year; that thereafter he would be paid three-quarters of the normal board charge per month; that when the horse was sold, defendant was to receive one-quarter of the net sales price. She alleges this was confirmed by a letter dated September 7, 1960, although it was conceded in the testimony that this letter was not delivered until some time later. Defendant denied that he ever agreed to those terms although he did continue to board the horse after the receipt of the letter.

Defendant in turn testified that he had several conferences and conversations about the agreement and that "It came down to * * * the horse there would be put in my care and I would have the exclusive right in all training, who was to ride the horse, what shows he was to be entered in, and I would have exclusive sale rights on the horse - - - that is the exclusive right to sell the horse; we would have to concur in the sale, what the price was."

He also testified:

" I was to receive my expenses - - normal expenses and

in the agreement not to bill for them for a period of at least one year. I would instead of receiving the sum of ten per cent, I would get 25 per cent * * *of the gross sale."

On this state of the record the jury properly could decide whether or not any agreement had actually been entered into and if there was no agreement, whether or not defendant was entitled to reasonable charges under quantum meruit or if there was a mutual agreement, what its terms were and whether or not it had been breached.

Plaintiff argued the improbability of defendant's position to the jury; however, the jury, being the arbiter of the facts in the case, rendered a verdict in the sum of $2000.00. The testimony would have supported a verdict of $2287.52. Under the circumstances we find no error regarding defendant's position in this case.

Counsel for the plaintiff also contends that certain unnecessary statements in closing arguments, comparing the wealth and potential net gain of the opposing parties were so obnoxious as to require a new trial.

We have read the abstract and record in this case and although the remarks made by counsel for the defendant went beyond proper comment, we do not believe that they were of such a nature as to influence the jury in such a manner which would call for a mistrial.

The verdict of the Trial Court will be sustained.

MORAN, P. J. concurs:

ABRAHAMSON J. dissents:

It appears to me that the final argument of defense counsel far exceeded the bounds of propriety, even though not objected to, and comes within the principles set forth in Belfield v. Coop, 8 Ill. 2d 293, 312.

In The

Appellate Court of Illinois

Second District

Abstract

SALLY H. FAIRWEATHER, Plaintiff-Appellant, VS. ROBERT BREEN, Defendant-Appellee,	)	Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois Honorable Glenn K. Seidenfeld, Chief Judge

SUPPLEMENTAL OPINION

MR. JUSTICE ATTEN DELIVERED THE OPINION OF THE COURT:

Appellant has filed a Petition for a rehearing wherein she suggests the Court either overlooked or misapprehended the assignments of error raised in her original brief and argument, namely: (1) the granting of defendant's instruction no. 1, which she contends is a quantum meruit instruction and, therefore, improperly given in this case, and (2) defendant's counsel remarks made in his final summation to the jury.

With reference to defendant's instruction no. 1, considering the evidence together with all of the instructions as a whole, the giving of this instruction is not reversible error.

Also, with reference to the arguments of counsel, as we stated in our original opinion, even though said remarks went beyond proper comment they were not objected to at the trial and we do not believe that they were of such a nature as to influence the jury in such a manner which would call for a mistrial.

It is therefore ordered that said Petition for a rehearing be denied.

MORAN, J. concurs

ABRAHAMSON, J. dissents

50521

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit
v.	)	Court of Cook County,
ELIJAH BARREN (Impleaded), Defendant-Appellant.	)	Criminal Division.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

A jury found Elijah Barren guilty of armed robbery and he was sentenced to the penitentiary for a term of from 8 to 20 years. A codefendant, Robert Ethridge, was similarly tried, convicted and sentenced.

Barren and Ethridge prosecuted separate appeals to this court. Although they raised the same two points no motion was made to consolidate the appeals.

An examination of the record discloses that one of the points (that a motion for substitution of judges was erroneously denied) applies only to Ethridge and was considered in People v. Ethridge, No. 50520, filed December 15, 1966. The verified motion for substitution of judges was filed in the trial court which alleged prejudice on the part of the trial judge. This motion originally contained the names of both defendants; however, Barren's name was crossed out and he did not join in the motion. The motion was signed by Ethridge alone and was heard and decided only as to him. There is nothing in the record to indicate that Barren ever made a similar motion.

The defendant's second point is that he is entitled to a discharge because the indictment was defective in that it did not state the time and place of the offense with the degree of specificity required by the 1963 Code of Criminal Procedure

which provides that a charge shall allege the commission of an offense by, "Stating the time and place of the offense as definitely as can be done." Ill. Rev. Stat., 1963, ch. 38, para. 111-3(a)(4). This same point has been raised in many cases and has been passed upon adversely to the defendant's contention. E.g., People v. Blanchett, 33 Ill. 2d 527, 212 N.E.2d 97 (1965); People v. Petropoulos, 34 Ill. 2d 179, 214 N.E.2d 765 (1966); People v. Petropoulos, 59 Ill. App. 2d 298, 208 N.E.2d 325 (1965); People v. Bridges, 67 Ill. App. 2d 34, 214 N.E.2d 539 (1966). The defendant's indictment complied with the criteria set forth in these cases.

The judgment of the Criminal Division of the Circuit Court of Cook County is affirmed.

Affirmed.

Sullivan, P.J., and Schwartz, J., concur.

Abstract only.

51592

DOROTHY BRIDSON, Plaintiff-Appellant, v. MAYWOOD CAB CO. INC., Defendant-Appellee.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order which vacated a judgment in favor of the plaintiff. Plaintiff's theory on this appeal is that the defendant did not comply with Section 72 of the Civil Practice Act and that the defendant did not have legal capacity to institute these proceedings. The defendant failed to file a brief.

On June 24, 1964, the plaintiff commenced her action against the defendant for injuries received while a passenger in one of defendant's cabs. Summons was served on the defendant, which filed its appearance, jury demand and answer. When the matter came up for pretrial hearing the defendant failed to appear and the matter was continued and notice was served by the Clerk of the Court on both parties. Defendant again failed to appear. A verdict was returned in favor of the plaintiff and judgment was entered in the sum of $5,000.00 on the verdict. Plaintiff then instituted garnishment proceedings against a bank account of the defendant. More than thirty days after the entry of judgment the defendant made its motion to vacate the judgment on the following grounds:

1. The first notice received by the defendant of any judgment entered against it was a notice of garnishment against its account at the First National Bank of Maywood.

2. The summons which had been previously served upon the defendant was forwarded to its insurer, Lincoln Casualty Company, and that, thereafter, the Lincoln Casualty Company was restrained by the Illinois Department of Insurance from doing business in Illinois and no notice was received by the defendant of the status of these proceedings.

3. Thereafter, without notice to the defendant, the attorney retained by the Lincoln Casualty Company withdrew from the case and the default judgment was entered.

We need only concern ourselves with defendant's first contention, namely, that the plaintiff did not comply with the requirements of Section 72, (2), Civil Practice Act, which is as follows:

> "The petition must be filed in the same proceeding in which the order, judgment or decree was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. All parties to the petition shall be notified as provided by rule."

The rule is well established that a person may not avail himself of the present remedy unless he shows that through no fault or negligence of his own, the error of fact or the existence of a valid defense was not made to appear to the trial court. Guth v. People, 402 Ill. 286, 83 N.E.2d 590; Greene v. People, 402 Ill. 224, 83 N.E.2d 582. A motion to vacate is not intended to relieve a party from the consequences of his own mistake or negligence. McCord v. Briggs and Turivas, 338 Ill. 158, 170 N.E. 320; Cramer v. Illinois Commercial Men's Ass'n, 260 Ill. 516, 103 N.E. 516.

In Chmielewski v. Marich, 2 Ill.2d 568, 119 N.E.2d 247, the defendant against whom a default judgment had been entered had given the summons in the case to the insurance brokers from whom the insurance policy covering the liability had been obtained and they had advised him they would take care of the matter; the court held his reliance on the insurance brokers did not relieve him of the consequences of the brokers' failure to fulfill their undertaking, his failure to appear and defend was not excusable as between him and the plaintiff, and a motion to set aside or vacate the judgment should be denied. In Gustafson v. Lundquist, 334 Ill. App. 287, 79 N.E.2d 306, the defendant had mailed the summons to the adjuster for his insurance company, it was received by the adjuster, the adjuster was then ill, inexperienced help in his office filed it, and it did not come to the adjuster's

attention until later; the Court held the defendant was not diligent, there was no excusable mistake, and a motion to set aside or vacate the judgment should be denied. And, in Wagner v. Sulka, 336 Ill. App. 101, 82 N.E.2d 922, the defendant had mailed the summons to the insurance broker from whom the insurance policy had been purchased, but the insurance company did not receive the summons; the court held there was no excusable mistake, the defendant was not diligent, he had the burden to inquire whether the summons had reached the hands of the insurance company and to have had reasonable assurance a defense had been made, the fact the defendant received no inquiry from the insurer as to the facts upon which a defense was to be predicated should have placed him on notice that no defense had been made within the time stated in the summons, and a petition to set aside or vacate the judgment should be denied.

It is admitted by the defendant in an affidavit in support of the motion to vacate that he received the summons and that he sent the summons to his insurer. It is also admitted that the insurer had been restrained from doing business by the Department of Insurance. It is apparent that the defendant took no further steps to protect its interest in this cause of action. Common sense and sound business practice alone should have put the defendant on notice that it should take steps to protect itself. In view of what we believe would have been prudent business practice and in view of the above cited precedents, it is our opinion that the trial court committed error when it granted defendant's motion to vacate. The order is reversed and the cause remanded with directions to reinstate the judgment in favor of the plaintiff.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

LYONS, P.J., and BURKE, J., concur.

51552

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DEAN WOLFSON, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

This is an appeal from a conviction for the crime of bribery, with sentence of probation, for a period of three years, after a trial without a jury.

At the trial, Robert Kahn, an inspector for the State of Illinois Division of Narcotic Control, testified that on June 6, 1963, he, along with two other inspectors, arrested Alfred Evans for the unlawful sale of narcotics and that an informer named Joe Vega was also present.

Kahn further testified that he was acquainted with defendant Wolfson; that he ran into defendant in July 1963 and invited defendant to use a swimming pool in the building in which he was residing; that defendant subsequently utilized the pool; that he did not see defendant until October 11, 1963 in Narcotics Court; that defendant came over to where he was seated and stated, "I have something important to talk to you about, Bob"; and that defendant said:

> Look Bob, I know him, an attorney, he has been appointed to represent him, and he is not too smart in there. He has a client by the name of Al, he said it would be worth $500 to you if you were to keep the informer out of Court, or any way of keeping him out, it is up to you.

Kahn further testified that he asked defendant who his attorney was; that defendant gave his name as Kaplan; that defendant again stated "the only thing you have to do is keep the informer out of court, or any way you want to take care of it"; that the conversation concluded with defendant instructing Kahn to call him on October 15th; that he immediately called his supervisor, Phillip Fisher, and reported what had occurred; that the same day he wrote a report on the incident

and submitted it to Fisher; that he did not call defendant on October 15th, but saw him in the Criminal Court Building on October 18th; that he asked defendant what was happening; that defendant replied, "Well everything is still on if that is what you mean"; that a meeting was arranged by his superiors with Roswell Spencer, Chief Investigator of the Cook County State's Attorney's police; that they went to 5924 West Madison, along with Officers Beeson and Brown; that Officer Beeson connected a tape recorder to the terminal box of the telephone system; that Kahn made a telephone call using a telephone number previously given to him by defendant; that the conversation between defendant and himself was recorded and monitored by Officer Beeson; that on October 19, 1963, Kahn again went to the above address, telephoned Wolfson and conversed with him, while Officer Beeson recorded the conversation; that thereafter six more telephone calls were made to Wolfson and monitored by Officer Beeson with Kahn's knowledge and consent; and that the final four conversations were initiated from a private telephone in Beeson's office in the Criminal Court Building.

Inspector Kahn further testified that around January 8, 1964, he and defendant met at the Criminal Court Building; that defendant told him, "My world is coming down around my heels. Can I talk to you about this case?"; that he agreed to meet defendant that evening; that defendant picked Kahn up at his home and while driving around in defendant's car, defendant asked him to deny recognition of the voices on the first two recordings; that he told defendant he would see what he could do; that on February 5, 1964, he received a note to call defendant; that defendant picked him up at his house and they went to an all-night restaurant; that defendant again asked Kahn to deny recognition of the voices on the tapes; that on the morning of the grand jury hearings he went to his supervisor and told him that he could not recognize the voices on the tapes; that never-

theless, he later testified before the grand jury and admitted recognizing the voices on the tapes; and that he admitted that he had lied that morning outside the grand jury room when he denied recognizing the voices on the tape recordings.

Officer Beeson and Roswell Spencer testified as to the time and place where the calls were made and the methods employed in recording the conversations.

Defendant testified that he did not offer Kahn any money; that Kahn approached him with a request for $500, which he said he needed in order to buy a promotion within the Narcotics Division; that Kahn asked him to contact an attorney by the name of Marshall Kaplan to dispose of a case he was handling, in order that Kahn might be free to go to Washington to Federal Narcotics School; that he never had any intention of giving Kahn the $500 but stalled him because he feared that Kahn would take it out on his clients if he refused; and that he admitted being the party who talked to Kahn in the recorded telephone conversations but again reiterated that the conversations were about the requested loan and the disposing of a case by Kaplan so that Kahn could go to Washington.

Sam Adam, an attorney, testified that he was with Wolfson in the Criminal Court Building when Kahn approached them; that Kahn asked defendant if defendant might speak to a Marshall Kaplan about having a case disposed of; that defendant said he would speak to Kaplan; that Kahn told defendant there was something else he wanted to ask and they moved a few steps away; and that when Wolfson returned he said, "That son-of-a-bitch wants to hit me for $500."

Gerald Aronin, an attorney associated with defendant, testified that he was with defendant at a night club called the "Orange Tree"; that Kahn came in while they were there; and that Kahn told Wolfson that he made a connection and wondered if the money would be ready when he needed it.

In rebuttal, the State again produced Inspector Kahn, who testified that in addition to his salary, he received income from a trust and dividends for stocks and an amount every month from his family. He denied having been in the "Orange Tree" and requesting money from defendant.

Roswell Spencer, the State's Attorney's Chief Investigator, testified that he was in the Criminal Court Building with defendant, Officer Beeson and Assistant State's Attorney Houlihan; that he played the tape recordings and asked defendant if he denied that was his voice on the tapes; and that Wolfson replied, "I certainly do deny that it was my voice."

Defendant, in surrebuttal, stated that he believed that it was his voice on the tapes when he was in the room with Spencer and the others, but attempted to explain his former denial by saying that he was quite excited at the time.

The court sitting without a jury found defendant guilty of bribery and he was given three years probation with no requirement that he report to a probation officer.

Defendant raises a number of points on appeal. We feel, however, there are only two that we must consider in order to dispose of this matter. Defendant first contends that the court erred in failing to suppress the evidence obtained through the wiretap. The People concede that the Illinois Eavesdropping Statute, Ill. Rev. Stat. (1961) Chap. 38, §14-1, as construed in People v. Kurth, 34 Ill.2d 387, 216 N.E.2d 154 (1966) prohibits wiretap evidence against non-consenting conversants. Thus, the wiretap evidence was inadmissible and it was error not to suppress that evidence. It must be borne in mind, however, that at the time of the trial (February 1965) the trial judge did not have the benefit of the decision in People v. Kurth, supra.

We must next consider whether the failure to suppress the

evidence resulted in reversible error. We are aware of the proposition, that it is presumed, in a bench trial, that the trial judge considers only competent evidence. Where, however, there is evidence in the record that the trial judge utilized inadmissible evidence in reaching his decision the aforesaid presumption is overcome., People v. Smith, 55 Ill. App.2d 480, 488, 204 N.E.2d 577 (1965). We find evidence in the record that the trial judge utilized the wiretap evidence. Therefore, reversible error was committed by the trial court.

Defendant, however, in his second contention, asks that the conviction be reversed without remand in that there is insufficient evidence, after excluding the inadmissible wiretap evidence, to sustain the State's charges. A careful examination of the entire record compels us to agree with defendant. For the above reason, the judgment is reversed.

JUDGMENT REVERSED.

BRYANT, P.J., and BURKE, J., concur.

51552

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DEAN WOLFSON, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

ON REHEARING

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT:

On rehearing, having again studied the briefs, arguments and abstracts and having considered the petition for rehearing, the answer thereto and the reply, we have decided to adhere to our opinion except for the last paragraph of the opinion, which is hereby stricken and replaced by the following:

Therefore, the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

JUDGMENT REVERSED AND THE CAUSE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

BURKE, J., and BRYANT, J., concur.

51021

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	
v.	)	COURT OF COOK COUNTY,
	)	
STEPHEN STEELE,	)	CRIMINAL DIVISION.
	)	
Defendant-Appellant.	)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Following a trial without a jury defendant was found guilty of unlawful possession of a narcotic drug and sentenced to the penitentiary for a term of two to three years. His sole contention on appeal is that a stipulation entered into between defendant and the State, reciting that defendant possessed three tinfoil packets containing "cannabis sativa, commonly referred to as marijuana," was not sufficient to establish that it was a narcotic drug prohibited by statute. Defendant argues that the description of the substance as stipulated could bring it within one of the statutory exceptions[1] and therefore is not sufficient to support a finding of guilty.

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1. Ill. Rev. Stat., ch. 38, § 22-2-17(3) (1965).

> "'Cannabis' includes all parts of the plant Cannabis Sativa L. (commonly known as marihuana), whether growing or not; the seeds thereof, the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture,or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom) fiber, oil or cake, or the sterilized seed of such plant which is incapable of germination."

This identical argument was rejected in a recent case before this court (People v. Marichez, 73 Ill. App. 2d 230, 219 N.E.2d 624). We there held that the statute dealing with burden of proof in narcotics cases[2] places the burden on the defendant to support a claim that the narcotics possessed by him were in fact harmless substances.

Defendant's counsel contended on oral agreement that we erred in the Marichez decision, in that our interpretation of the burden of proof provision lessens the duty of the State in a criminal case to prove the defendant guilty beyond a reasonable doubt by requiring him to prove himself innocent. In the Marichez case we cited People v. Williams, 23 Ill. 2d 549, 179 N.E.2d 639, where the court said (p. 556):

> "Thus, if there is in this record evidence sufficient to raise a reasonable possibility that the defendant comes within the exception thus creating a reasonable doubt of his guilt, the defendant has met the burden of proof imposed upon him by the statute."

Where, as in Marichez and in the instant case, the defendant stipulates that he possessed marijuana and presents no evidence that brings him within the exceptions set forth in the statute, the stipulation is sufficient to support

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2. Ill. Rev. Stat., ch. 38, § 22-44 (1965).

> "In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provision of this Act, it shall not be necessary to negative any exception...contained in this Act, and the burden of proof of any such exception...shall be upon the defendant." (Emphasis ours.)

the finding of guilty.

Judgment affirmed.

Sullivan, P.J., and Dempsey, J., concur.

Abstract only.

Filed 2-16-67

79 I.A.2 431

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. M-10816 Agenda No. 67-8

Phyllis J. Sanderson,

Plaintiff-Appellee

vs.

Dave E. Sanderson,

Defendant-Appellant

Appeal from Circuit Court Champaign County

CRAVEN, P.J.:

Defendant appeals from a conviction for contempt of court. The contempt proceedings arise out of his alleged failure to abide by an injunction issued as an aftermath of a divorce proceeding. Defendant was found guilty of contempt on two grounds:

(a) Defendant failed to appear at a hearing at the time set by the court.

(b) Defendant failed to abide by the terms of the injunction writ.

The record shows that on July 23, 1965, plaintiff filed a petition for rule to show cause charging defendant with

harassment of the plaintiff in violation of an injunction prohibiting him from coming on the plaintiff's premises. This petition was originally set for hearing on July 30. A docket entry of that date shows that the respondent was personally present. He was ordered to make future support payment for his children to the clerk of the court. The docket entry also recited: "Hearing on Petition for Rule to Show Cause continued to August 6, 1965, at 1:30 p.m."

On August 6, the docket entry recites: "Petition of the Plaintiff for Rule on Defendant to Show Cause called for Hearing. Petitioner present in open court. Respondent called and not present in open court. Writ of Attachment directed to issue for said Respondent."

The attachment was issued August 9, 1965, and defendant was arrested almost one year later on July 23, 1966. At a hearing on July 25, 1966, the plaintiff orally moved that defendant be punished for failing to appear on August 6, 1965. He testified in a section 60 examination conducted by plaintiff's attorney. He related that he appeared, as directed, at the hearing on a petition for rule to show cause on July 30, 1965; that he was hard of hearing and that although he heard the judge say it was continued to a following week, he did not hear the judge say it was continued to 1:30 p.m. on the 6th of August, 1965, which would have been one week from the date of the hearing. He showed

up on the morning of August 6, 1965, in the circuit court of Champaign County in the same courtroom he had been in the week before and no one was there, so he left. Based upon this testimony, the court found the defendant guilty of contempt for failure to appear on August 6, 1965.

At this point, evidence was heard concerning the defendant's alleged failure to abide by the terms of the injunction. The only evidence again was testimony by defendant under section 60 that on the day in question he went to his wife's house to leave money with the children for the children's support, but she was not there and the children refused to come outside of the house and take the money, and he left. Based upon this testimony, the court found the defendant had violated the terms of the injunction and sentenced him to seven days in the county jail on each charge, to be served concurrently. The sole evidence presented on that issue indicates the defendant attempted to leave support money provided by the divorce decree at his ex-wife's house.

His failure to attend the hearing, under the circumstances, is not contempt. There is nothing in the record which suggests a clear mandate or order to the defendant that he be present at the time specified in the docket entry. The defendant was present on the day the hearing was scheduled, but was too early and left. He was not advised that the hearing would

be held later in the day and assumed that it had been postponed. In addition, there is no evidence that the court apprised the defendant of the charge against him and gave him an opportunity to be heard. The rules which govern disposition of this case are the rules which apply to indirect contempt, as nothing occurred in the presence of the court which indicated that the defendant committed acts which showed his disregard for the authority or majesty of the court or the judicial process. People v. Wilcox, 5 Ill. 2d 222, 125 N.E.2d 453 (1955).

For the above and foregoing reasons, the judgment of the circuit court of Champaign County is reversed and the cause is remanded with directions that the judgment of contempt be vacated and the attachment be dissolved.

Reversed and remanded with directions.

SMITH and TRAPP, J.J., concur.

79 I.A. 2 486

NO. 66-28

abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ALGONQUIN MANOR BUILDING CORPORATION, an Illinois Corporation,	)	
Plaintiff-Appellant,	)	Appeal from the Circuit Court
vs.	)	of the Nineteenth Judicial Circuit,
BARNEY WATERS, d/b/a GRAYSLAKE SAND AND GRAVEL, and AETNA INSURANCE COMPANY, a Corporation,	)	Lake County, Illinois, Magistrate Division.
Defendants-Appellees.	)	

MR. PRESIDING JUSTICE MORAN delivered the opinion of the Court:

This appeal is from a directed verdict and judgment entered thereon by a magistrate at the close of the case in chief involving a breach of contract action.

The plaintiff entered into a written contract with the defendant on August 4, 1957. For the purpose of this appeal it will be necessary to refer only to the defendant Barney Waters, d/b/a Grayslake Sand and Gravel. By the terms of the contract the defendant was to grade and gravel 1335 feet of roadway in a subdivision being developed by the plaintiff. In return the plaintiff was to pay the defendant the sum of $3000.00 upon completion

of the grading; $1968.75 upon completion of 75 per cent of the graveling and the balance of $656.25 upon acceptance of the work. The first phase of the work, that is the grading, was completed and the defendant received two checks from the plaintiff which totaled $3000.00. Thereafter, no further work was performed by the defendant.

The magistrate at the close of the plaintiff's proofs allowed the defendant's motion for a directed verdict. The decision was based upon the fact that the plaintiff had failed to prove one of the necessary elements of his case, namely, damages. The question then before this Court is whether there is any evidence in the record, together with all reasonable inferences arising therefrom in favor of the plaintiff, which tends to prove that the plaintiff had been damaged.

The plaintiff argues that during his examination of the defendant under Section 60 of the Civil Practice Act, (Chap. 110, Sec. 60, Ill. Rev. Stats., 1965), it was established that the defendant was paid the total sum due under the contract and since the defendant, admittedly, never completed his performance as agreed, the amount of damages was the total contract price of $5625.00.

The first fallacy in this argument is that the record does not bear out the premise that the defendant was paid the full contract price. While it is true that the plaintiff attempted to show through the defendant that a mechanic's lien waiver showing payment in full was given to the plaintiff, still this was not established as a matter of fact; nor did the plaintiff ever offer into evidence the referred to instrument. Second, and more basically however, is the plaintiff's proof toward the necessary element of damages. The plaintiff selected to have transcribed only a portion of the report of proceedings; and

a review of the record discloses that the plaintiff called four witnesses, including the defendant, as previously stated. The other three witnesses included a building and zoning officer of McHenry County, a real estate appraiser and a road construction contractor. Nowhere in any of their testimony did they refer to the cost of completion of the contract; or, as a matter of fact, to any dollar amount by which the plaintiff had been damaged.

The proper measure of damages for partial or incomplete performance of a contract, such as involved here, is the reasonable cost of completion. 15 I.L.P., Damages, Sec. 146; Mason v Griffith, 281 Ill. 246, 256 (1917).

It was incumbent upon the plaintiff to prove each and every necessary element of his case by a preponderance of the evidence, which includes the element of damages. His failure to do so left the trial magistrate with no alternative but to direct a verdict in favor of the defendant.

JUDGMENT AFFIRMED.

Abrahamson and Seidenfeld, JJ., concur.